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COURT OF CRIMINAL APPEALS
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No. PD-0020-21

IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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THE STATE OF TEXAS
Petitioner (Appellant in the Court of Appeals)
v.
LAKESIA BRENT
Respondent (Appellee in the Court of Appeals)

On Review from No. 01-19-01008-CR
in which the First District Court of Appeals
considered Cause Number 2012280
from County Court at Law No. 12
Harris County, Texas

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes and Rules

Other Sources

STATEMENT OF THE CASE

The State's consolidated Statement of the Case and Statement of Facts accurately summarizes the factual and procedural history of the case.

A NOTE ON TERMINOLOGY

As the State noted in its brief at Footnote 1, the term "judicial clemency" is not found in the statute, but is a common way to refer to the type of discharge and dismissal granted under Code of Criminal Procedure Art. 42A.701(f). Respondent will use "judicial clemency" in referring to the type of discharge and dismissal granted under art. 42A.701(f).

GROUND FOR REVIEW

This Court granted review on a single ground:

> Did the First Court of Appeals err when it found that the trial court maintained jurisdiction for the purposes of granting "judicial clemency"?

SUMMARY OF THE ARGUMENT

As the Legislature has not limited a trial court's jurisdiction to grant judicial clemency, the trial court did not err in granting Ms. Brent's motion for judicial clemency. The legislative intent is apparent from the plain text of the statute as well as public policy considerations. The State's argument, and the courts of appeal decisions it relies on, have erroneously applied the 30-day plenary power given to courts for motions for new trial and in arrest of judgment to the judicial clemency process.

ARGUMENT

The First Court of Appeals did not err when it upheld the trial court's granting of judicial clemency.

A. Text of Code of Criminal Procedure art. 42A.701(f)

The specific subsection at issue, Code of Criminal Procedure Art. 42A.701(f), does not contain a time limit during which judges can grant clemency, but that is not to say that the article contains no limitation on the judge's power. Although the State dismisses section (g) of this article as inapplicable (State's Brief on Discretionary Review at 9), 42A.701(g) limits the trial court's power to grant clemency by declaring convictions for certain offenses as ineligible. The legislature clearly intended to limit the granting of clemency when it drafted this section, and there is no reason to believe it would have hesitated to include a time restriction had it wished to.

The State engages in structural analysis and comes to the conclusion that, because (f) states "if the judge discharges the defendant under this article, the judge may set aside the verdict…" and because section (e) instructs a judge to discharge a defendant who has successfully completed their community supervision, then the legislature must have intended clemency in (f) to also

happen "at the time of clemency, or perhaps during its plenary power period, but not afterward." State's Brief on Discretionary Review at 11.

The State writes that the court of appeals "did not analyze the statute's structure or explain how it indicated that there was no limitation" (State's Brief on Discretionary Review), but this is patently untrue. The court both analyzed the statute structure and explained how that structure indicated there was no limitation in its well-considered opinion. *State v. Brent*, 615 S.W.3d 667, 674-75 (Tex. App.—Houston [1st Dist.] 2020, pet. granted). The court found that "discharge [from community supervision] and judicial clemency are separate forms of relief, created and governed by separate parts of the statute," but are related because "discharge from community supervision is a precondition for judicial clemency." *Id*. To limit jurisdiction to grant clemency to thirty days after discharge "is to read a limitation into the statute that simply is not there." *State v. Shelton*. 396 S.W.3d 614, 621 (Tex. App.—Amarillo 2012, pet. ref'd)(Pirtle, J., dissenting).

A brief look at the statute's history shows that the legislature, though having many opportunities to add a jurisdictional time limit, declined to do so. Article 42A.701(f) became effective in 1957 as Art. 781(d), section 7, and was moved to its current section during the 2017 Texas Legislative Session. *Cuellar*

v. State, 70 S.W.3d 815, 831 (Tex. Crim. App. 2002)(Keasler, J., dissenting). The Legislature made several substantive and structural amendments to the statute over the years – in 1966, 1984, 1989, 1993, and 1999. *Id*. Despite having numerous opportunities to do so, the Legislature has yet to add an explicit time limitation on the trial court's authority to grant judicial clemency.

The State also looks to Subsection (f-1) of the article, which mandates the Office of Court Administration adopt a form that judges must use to discharge persons from community supervision under this article, as proof that judicial clemency can only be given at the time of discharge or close thereto. Tex. CODE CRIM. PROC. art. 42A.701(f-1). The State takes this language to mean that "discharge and clemency are to occur that (sic) the same time," (State's Brief on Discretionary Review at 11), despite there existing no language in the statute forcing judges to either grant clemency at the time of discharge or forgo it forever. The statute allows the judge to grant clemency at the time of discharge, but does not mandate it. To read otherwise would require a substantive change in the language of the statute, such as "If the judge has so discharged the defendant, then they may grant clemency *at that time*."

The State contradicts itself here by arguing both that judicial clemency must be given when the probationer is discharged (and marked thus on the

form) (State's Brief on Discretionary Review at 11), and also that the court can grant judicial clemency for up to 30 days (State's Brief on Discretionary Review at 10), even though there is no option that allows for discharge now and a potential judicial clemency grant within 30 days.

B. Searching for a Basis in Law for a 30-day Limitation

1. Plenary Power

The State accuses the court of appeals of ignoring that "a court's plenary power has limitations" (State's Brief on Discretionary Review at 12), but the State itself ignores that clemency is not limited by plenary power, as it is not a motion for new trial or a motion in arrest of judgment. Additionally, in claiming that "the court of appeals has imbued trial courts with unending jurisdiction – a thing unmatched in any other context," (State's Brief on Discretionary Review at 11-12), the State ignores other circumstances when the trial court's power is not curtailed by a 30-day limitation. One such example is the trial court's power to enforce its order that a defendant pay fines and fees, even after a period of community supervision ends. TEX. CODE CRIM. PROC. art. 42A.651(b) ("A defendant remains obligated to pay any unpaid fine or court cost after the expiration of the defendant's plenary period of community supervision.").

The State's brief quotes both *State v. Robinson* and *State v. Dunbar* for the proposition that a trial court lacks any power after the 30-day mark (State's

Brief on Discretionary Review at 8-9). "After a trial court imposes a sentence and adjourns for the day, it loses plenary power to modify the sentence unless, within thirty days, the defendant files a motion for new trial or a motion in arrest of judgment;" *State v. Robinson*, 498 S.W.3d 914, 919 (Tex. Crim. App. 2016)(emphasis added). Yet *Robinson* itself recognizes that this rule has exceptions, as the opinion centers on trial court jurisdiction for shock-probation purposes, which is 180 days. *Id.*

Likewise, the State relies on *State v. Dunbar*'s holding that "beyond that thirty-day period, a source of jurisdiction must be found to authorize the trial court's orders." State's Brief on Discretionary Review at 8-9; *State v. Dunbar*, 297 S.W.3d 777, 780 (Tex. Crim. App. 2009). *Dunbar* states that "if no community supervision is imposed, no motions for new trial or in arrest of judgment are filed, and no appeal taken, then the trial court's personal jurisdiction terminates thirty days after sentencing." *Id.* at 779. The *Dunbar* court then address one exception to that rule – the statute granting jurisdiction to a trial court to impose shock probation 180 days after imposition of sentence.

Quoting *State v. Patrick*, the State argues "the fact that the Legislature did not include a time limitation does not indicate there is no time limitation; instead, the fact that the Legislature did not include a time *extension* indicates that there is a limitation." State's Brief on Discretionary Review at 12; *State v.*

Patrick, 86 S.W.3d 592, 595 n.13 (Tex. Crim. App. 2002). Again, the State begins from a position that there is a 30-day limitation, ignoring that judicial clemency is not one of the actions encompassed by plenary power. It is not a motion for new trial or in arrest of judgment. Not being encumbered by the 30-day limitation, an extension is not necessary.

The principle sources of a trial court's jurisdiction over the subject matter of a case consists of express grants of power conferred by constitution, statute, or common law. *Brent,* 615 S.W.3d at 672, citing *Dunbar*, 297 S.W.3d at 780. Additional sources of jurisdiction consist of grants of inherent and implied power, which are those "which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, or in the preservation of its independence and integrity," and those powers which arise from and are exercised in furtherance of express grants of power. *Brent*, 615 S.W.3d at 672, citing *State v. Johnson*, 821 S.W.2d 609, 612 (Tex. Crim. App. 1991), *Patrick*, 86 S.W.3d at 595.

As *Patrick* makes clear, jurisdiction can be conferred by statute. *Patrick*, 86 S.W.3d. at 596. Indeed, the holding in *Patrick* was that a trial court's jurisdiction ended after it ruled against a defendant in Chapter 64 DNA testing proceedings. *Id.* The DNA testing statute, like the shock probation statute, is another example of jurisdiction beyond 30-days being vested in the trial court by statute.

In sum, the State mistakenly relies on plenary power limitations in this context. "Plenary power refers to that period of time in which a trial court may vacate its judgement by granting a new trial, or in which it may modify or correct its judgment." *In re Gillespie*, 124 S.W.3d 699, 702 (Tex. App.—Houston [14th Dist.] 2003, no pet.). Plenary power refers to a specific power of the trial court; it does not refer to *all* powers of the trial court. When a trial court issues an order of judicial clemency, the court is not "vacating its judgment by granting a new trial," nor is it "modify[ing] or correct[ing] its judgment." *Id.* Rather, the court is "setting aside the verdict." TEX. CODE CRIM. PROC. art. 42A.701(f).

2. A False Equivalency: Motions for New Trial and in Arrest of Judgment

Motions for new trial and in arrest of judgment are permitted for 30 days because the statute governing those motions specifically limits them to 30 days after the date sentence is imposed or suspended. TEX. R. APP. PROC. 21.4(a) & 22.3. The legislature wanted to limit the time in which these motions could be filed, so it did.

The cases cited by the State, detailed below, base their limit on jurisdiction for judicial clemency on the limit placed on motions for new trial and motions in arrest of judgment. This is a false equivalency, as the purpose behind judicial clemency and motions for new trial or in arrest of judgment are vastly different.

Motions in arrest of judgment are filed when a defendant believes the judgment against him was contrary to law. TEX. R. APP. PROC. 22.3. Grounds for filing such a motion include exceptions to or substantive defects in the indictment or information on substantive grounds, or an invalid judgment. *Id.* These grounds are all identifiable immediately after entering the judgment, if not before.

Similarly, a motion for new trial can be filed when certain grounds, listed in TEX. R. APP. PROC. 21.3, exist. All such grounds would be known or become known contemporaneously with the imposed sentence. Logically, the Legislature would limit a trial court's jurisdiction to hear these two types of motions to very near the end of trial and imposition of the sentence. The passage of time would benefit neither the party filing the motion nor the trial court in deciding upon that motion. The opposite is true of judicial clemency, as discussed in Section 4.

3. Courts of Appeal

The State cites several cases in other courts of appeal that agree with its position. These cases – *State v. Perez*, 494 S.W.3d 901 (Tex. App.—Corpus Christi 2016, no pet.); *State v. Fielder*, 376 S.W.3d 784 (Tex. App.—Waco 2011, no pet.); *Poornan v. State*, No. 05-18-000354-CR, 2018 WL 6566688 (Tex. App.—Dallas Dec. 13, 2008, no pet)(not designated for publication); *State v.*

Shelton, 396 S.W.3d at 616 – all impose a 30-day deadline on judicial clemency based on the separate and unrelated statutes governing motions for new trial and in arrest of judgment, although the *Perez* court specifically qualified its opinion as being valid only "absent further guidance from the Texas Court of Criminal Appeals or the Legislature." *Perez*, 494 S.W.3d at 905.

Additionally the State cites to *Buie v. State*, which is not relevant to the issue at hand. In *Buie*, the court found the defendant ineligible for judicial clemency, not because of a time limit on jurisdiction, but because the Defendant had been convicted of DWI. *Buie v. State*, No. 06-13-00024-CR, 2013 WL 5310532 at 2 (Tex. App.—Texarkana Sept. 20, 2013)(mem. op., not designated for publication). DWI convictions are statutorily prohibited from judicial clemency. CODE CRIM. PROC. art. 42A.701(g).

In *Brent*, the first court of appeals correctly found that all of these decisions rest "on the erroneous construction of article 42A.701, one that requires the trial court to discharge the defendant and grant judicial clemency *at the same time*." *Brent*, 615 S.W.3d at 674 (emphasis in original). Furthermore, upon evaluating those cases, the court found that there was "no textual basis for imposing such a requirement." *Id.* "Discharge and judicial clemency are separate forms of relief, created and governed by separate parts of the statute." *Id.*, citing TEX. CODE CRIM. PROC. articles 42A.701(e) and 42A.701(f). The relation

of the two statutes to each other indicates that the prerequisite for judicial clemency is being discharged from community supervision. "This conditional language establishes when a trial court's power to grant judicial clemency *arises* (when the trial court discharges the defendant), but it says nothing about when the trial court's power *expires*. *Brent*, 615 S.W.3d at 674. "To limit the trial court's authority to consider an application for judicial clemency to that period of time immediately concurrent to a mandatory discharge of a defendant within thirty days of the successful completion of community supervision is to read a limitation into the statute that simply is not there." *Id.*, citing *Shelton*, 396 S.W.3d at 621 (Pirtle, J., dissenting).

4. A More Accurate Parallel: Petitions for Nondisclosure

The State's position, and the cases it cites in support of that position, all equate motions for new trial and in arrest of judgment with judicial clemency. This is an incorrect and unfounded equivalency, and it best illustrated by the trial court in this case:

> The State is essentially proposing that [judicial clemency] is analogous to a motion for new trial or a motion in arrest of judgment. The Court disagrees with that. That is when someone has been duly convicted and then they are claiming that there was something wrong procedurally or something was done incorrectly. At which time they are fresh off of a trial and still in constant communication with their attorney and have the ability to prepare a motion for new trial or a motion to arrest judgment.

> I think that's vastly different from someone who was found guilty or pled guilty and sentenced to a period of probation that could be upwards of…years of probation. We do not admonish them like we do for a motion for new trial or motion to arrest judgment. They are not put on notice. Essentially after they finish their probation, they would not be usually in that type of communication with their attorney…which I think is an unreasonable request. Which is also why I think the legislature did not put a time period associated with this particular provision of the statute.

(3 R.R. at 5).

Although motions for judicial clemency are not akin to motions for new trial or motions in arrest of judgment, guidance can be found in petitions for nondisclosure. Their purpose and effect are similar to that of judicial clemency.

Petitions for nondisclosure are civil in nature, but are heard in the trial court where the criminal prosecution occurred. The effect of a petition for nondisclosure is to "legally [free one] from having to disclose certain information about your criminal history in response to questions on job applications…" and "prohibits entities holding information about a certain offense on [one's] criminal history record from disclosing that information." Office of Court Administration, Orders of Nondisclosure Overview (April 14, 2020), https://www.txcourts.gov/media/1445464/overview-of-orders-ofnondisclosure-2020.pdf. Similarly, the effect of judicial clemency is for the person to be "released from all penalties and disabilities resulting from the

offense for which the defendant has been convicted…" Tex. Code Crim. Proc. art. 42A.701(f).

Judicial clemency is a "legislatively enacted mechanism which is appropriate 'when a trial judge believes that a person on community supervision is completely rehabilitated and is ready to re-take his place as a law-abiding member of society....'" *Shelton*, 396 S.W.3d at 620 (Pirtle, J., dissenting), citing *Cuellar*, 70 S.W.3d at 819. Judicial clemency is not a right; rather, it is a matter that lies within and is entrusted to the sound discretion of a trial court judge. *Id*., citing *Cuellar*, 70 S.W.3d at 818–19. In order to grant a petition for nondisclosure, along with meeting statutory requirements, the trial court must find that the issuance of an order of nondisclosure is in the "best interest of justice." TEX. GOV'T CODE § 411.0745(e). To grant a request for judicial clemency, the trial court must declare the defendant completely rehabilitated and ready retake her place in society (3 R.R. at 6; C.R. at 64); *Cuellar*, 70 S.W.3d at 819. Both statutes are meant to lessen the burden of criminal convictions for qualifying individuals.

There are no statutory limitations on when a trial court's jurisdiction to grant a petition for nondisclosure expires. TEX. GOV'T CODE § 411. The only limitation is how soon a person may file a petition. TEX. GOV'T CODE § 411.0725 (e). Specifically, TEX. GOV'T CODE § 411.0725(e)(1,2) lists situations in which a

person must wait two or five years to file a petition for nondisclosure, and case law records defendants filing motions for nondisclosure nearly ten years after the end of their probationary periods. *Harris v. State*, 402 S.W.3d 758, 759-60 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

C. Policy Considerations

1. When it is Appropriate to Consider Policy Purposes

"When we interpret statutes, we seek to effectuate the collective intent or purpose of the legislators who enacted the legislation." *Robinson*, 498 S.W.3d at 920, citing *Boykin v. State,* 818 S.W.2d 782, 785 (Tex.Crim.App.1991). This requires "attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment." *Id.* If the meaning of the statute should have been plain to the legislators who enacted it, then courts should "give effect to that plain meaning." *Id.* The literal text in TEX. CODE CRIM. PROC. art. 42A.701(f) does not limit the trial court's jurisdiction to hear motions for judicial clemency.

Tex. Code Crim. Proc. art. 42A.701, became effective September 1, 2017. It was moved from Tex. Code Crim. Proc. art. 42.12 20(a) to this new section during the 2017 Texas Legislative Session. The Legislature could have used this opportunity to set a firm jurisdictional limit on judicial clemency, but it chose not to. The seminal rule of statutory construction is to presume that the

legislature knows how to draft statutes and it meant what it said. *State v. Vasilas*, 187 S.W.3d 486, 489 (Tex. Crim. App. 2006). In adhering to this rule, the decision to not include the explicit limitation within the statute was a deliberate choice by the Legislature. It strains reason to rationalize the legislature's declination to give a thirty-day limit equates to the Legislature implicitly intending a thirty-day limit.

2. The Statute is Not Ambiguous

Exception to the plain-reading premise is taken when literal reading of the text would lead to absurd consequences the Legislature could not possibly have intended. *Robinson*, 498 S.W.3d at 920. The plain reading of the judicial clemency statute does not produce absurd results. Trial courts already have unlimited jurisdiction to hear petitions for nondisclosure; extending that same understanding to judicial clemency would serve a consistent policy purpose.

The State argues that 42A.701 is not ambiguous because it clearly envisions a 30-days limit on the trial court's power to grant clemency, despite no time limit appearing anywhere in the statute's text. In fact, the State declares that "without language extending jurisdiction, the default is a limited period of plenary power – generally 30 days." State's Brief on Discretionary Review at 14.

Again, the question must be asked – why is this 30-day period assumed to apply to this statute ?– and again there is no satisfying answer. The State asks

the question but supplies no answer, no source for applying the plenary power limitation to clemency, citing cases that themselves fail to identify the source of their time limits.

Assuming that a 30-day time limit exists would violate the statutory interpretation canon of the rule against superfluity. If the absence of a stated 30-day limit in the statute in question means that such a time limit actually applies, that would render all statutes with a stated 30-day time limit superfluous. The courts should not adopt a statutory construction that renders parts of other statutes duplicative and therefore meaningless. See *Cameron v. Terrell & Garrett, Inc*., 618 S.W.2d 535, 540 (Tex. 1981)("[E]very word excluded from a statute must also be presumed to have been excluded for a purpose.") For example, Texas Code of Criminal Procedure Article 55.02 gives the trial court a right to grant expunction. But it explicitly limits this power up to 30-days after acquittal. If plenary power applies to every action taken by the court, then it applies to the ability of the court to grant expunction. Consequently, that renders the explicit time limit in that statute – as well as in the statutes governing motions for new trial and motions in arrest of judgment – meaningless. (See *City of Dallas v. TCI West End, Inc*. 463 S.W.3d 53, 55 (Tex. 2015)("We presume that the legislature chose a statute's language with care, including each word chosen for purpose.").

3. The State's Reading Would Produce Absurd Results

Although the text of the statute plainly applies no time limit to the clemency powers of the trial court, in response to the State's argument that limitless clemency jurisdiction would produce absurd results, it can be easily shown that the opposite is true. Forcing a judge to decide if a defendant is wholly rehabilitated within 30 days of (or worse, immediately upon) that person's discharge from community supervision would obviate the purpose of the clemency power. "The creation of such a limitation is inconsistent with the public policy purpose of judicial clemency altogether." *Brent*, 615 S.W.3d at 675, citing *Shelton*, 396 S.W.3d at 621 (Pirtle, J., dissenting).

First, the State argues that the time of discharge is when the trial court has the "greatest amount of information about a defendant's rehabilitation" because the court has been monitoring the defendant "for a long period of time." State's Brief on Discretionary review at 14. Although one's perspective of what "a long period of time" is will differ from person to person, many misdemeanor probationary periods can be as little as a few months (the *maximum* amount of community supervision can be 180 days in some situations; *see* TEX. CODE CRIM. PROC. art. 45.051(a)). In fact, Respondent's probationary period was one year, not a large amount of time to determine if

one has learned their lesson and is ready to resume her place among law-abiding citizens.

Under this logic, a trial court's best information as to whether a defendant is rehabilitated is how well that defendant behaves when under direct supervision and threat of revocation. Instead, the trial court in our case believed, correctly, that the most reliable indicators of rehabilitation were how an applicant has lived when not under those constraints.

The State's second point in arguing that extending the clemency time period beyond 30 days would produce absurd results is that "once a defendant is discharged from community supervision, the trial court has no way to monitor him or her." State's Brief on Discretionary Review at 14. Likewise, the State argues that the State would have little way to monitor the defendant and make an informed decision whether to oppose or agree with clemency. This argument ignores the trial court's role in deciding whether to grant clemency. The court must be convinced that the Defendant is fully rehabilitated. If the court is not persuaded by the evidence of rehabilitation presented by the Defendant, the court will not grant clemency.

The State contends that, due to lack of supervision, the trial court's decision would turn solely on whether the Defendant has been arrested since their community supervision discharge. State's Brief on Discretionary Review

at 15. This position fails to put any trust in the trial judge to demand more proof of rehabilitation than simply not being arrested. Proof of employment or furthering of education are others, as are the type of life changes that require responsibility and maturity, such as getting married, having children, or caring for older relatives. Each of these circumstances can arise in the years after completion of community supervision.

The court of appeals got it right – "many defendants will not be completely rehabilitated until sometime after they are discharged from community supervision" and the "best evidence of rehabilitation will often be the defendant's conduct post-discharged, when the defendant is no longer under direct supervision and threat of revocation." *Brent*, 615 S.W.3d at 675. Limiting the trial court's jurisdiction to grant judicial clemency to 30 days after discharge "inhibits the court's ability to assess whether the defendant is rehabilitated and thwarts the purpose of the statute." *Id.*

Lastly, the State argues that "the 'carrot' of judicial clemency is also a powerful motivator for a defendant to truly embrace and excel the terms and conditions of a community supervision." State's Brief on Discretionary Review at 15. This argument fails for three simple reasons. First, judicial clemency is not well known enough among criminal defendants (or prosecutors and criminal defense attorneys) to be a "carrot."

Second, the primary "carrot" in community supervision is not going to jail. Although the State believes that "if a defendant knows that the decision to grant clemency is tied to his performance while under supervision, a defendant is incentivized to complete the requirements and refrain from reoffending or failing his or her conditions," (State's Brief on Discretionary Review at 15-16), the true reason a defendant is incentivized to successfully complete a community supervision is the same reason the defendant agreed to it in the first place – to avoid going to jail. The State's contention that if a defendant knows clemency is available after being free from judicial supervision, the "incentive to comply with conditions is decreased," is unmoored from reality. There is no great clamoring for judicial clemency in the criminal courts; the incentive to comply with conditions is to avoid jail time.

Lastly, contrary to the State's belief, the objectives of probation and judicial clemency are not one and the same. The goal of a probationer is to comply with the terms and conditions of supervision, while the purpose of judicial clemency is to reward a defendant's complete rehabilitation. Being worthy of judicial clemency goes far beyond merely complying with conditions just enough to complete supervision.

D. Conclusion

The legislature saw fit to not impose a time limit on a trial court's ability to grant judicial clemency, and the courts should not usurp the legislative function by imposing a deadline in the legislature's stead. Any basis for a 30-day limit on trial court jurisdiction is wrongly based on the limitations in jurisdiction for motions for new trial and motions in arrest of judgment. Underlying public policy arguments support the plain reading of the text – that the legislature did not intent to limit a trial court's jurisdiction in hearing judicial clemency petitions to a 30-day period.

A BRIEF RESPONSE TO PETITIONER'S GROUND TWO (NOT GRANTED FOR REVIEW)

Although this Court only granted review of State's Ground One, the State nonetheless briefed Ground Two. Although not instructed to brief this issue, below is a succinct response. The ground is:

> Did the First Court of Appeals err when it found that Respondent's completed community supervision was eligible for "judicial clemency"?

The State argues that if a community supervision is discharged because the term has expired, then that is not a discharge under art. 42A.701. The State invents a "natural" discharge, one in which the period of community supervision ends before all terms and conditions are fulfilled, and then declares this type of discharge outside the scope of art. 42A.701.

The State argues that "there is nothing in the record to indicate that Appellee was discharged for satisfactorily fulfilling her terms and conditions," but instead was discharged "due to the natural expiration of her supervision period." State's Brief on Discretionary Review at 20. The State does not offer any facts or proof that, because the court allowed the supervision period to expire, it should be assumed that the terms and conditions of that supervision were not satisfactorily fulfilled.

Only Subchapter O of Article 42A addresses "Reduction or Termination of Community Supervision Period." This subchapter contains two statutes – 42A.701, which we address today, and 42A.702, which addresses time credits for felony probationers. The only other subchapter of Art. 42A to address how community supervision ends is Subchapter P, which covers "Revocation and Other Sanctions." If we read Art. 42A as the State suggests, there is no section that covers the discharge of any Defendant who satisfactorily complied with her conditions and whose term was allowed to expire.

The First Court of Appeals, assuming without deciding that the argument was preserved, was correct in finding that the trial court did not err in granting judicial clemency because the statute does not bar discharge of community supervision due to expiration of the term from consideration for judicial clemency. *Brent*, 615 S.W.3d at 675. The court lays out the structure of the statute. First, it establishes when the trial court may or must discharge someone from community supervision – Code of Crim. Proc. art. 42A.701(a),(b),(e). Next, the statute establishes when the trial court may grant judicial clemency, then imposes a duty on the courts to use a standardized form. CODE OF CRIM. PROC. art. 42A.701(f), (f-1). Lastly, in the final section, the statute specifies three types of offenses that are ineligible for judicial clemency. CODE OF CRIM. PROC. art. 42A.701(g). The court of appeals concluded, "by setting forth

provisions of general applicability, and then carving out exemptions from those provisions, the statute makes clear that it applies to any offense for which a defendant has been sentenced to community supervision, except for those offenses exempted by statute". *Brent*, 615 S.W.3d at 676.

There is no evidence in the record that Ms. Brent did not complete her community supervision requirements. In fact, the opposite is true. Had Ms. Brent not completed her community supervision requirements, there would be record of her revocation, sanctions, or extension of the probationary term. None of these things occurred. Furthermore, as the court of appeals correctly posits, it is undisputed "that Brent is completely rehabilitated and ready to re-take her place as a law-abiding member of society. We further observe that these express findings rest in part on implied findings that Brent fulfilled the terms and conditions of her community supervision. Because it is undisputed that Brent is rehabilitated, it is also undisputed that Brent successfully completed community supervision." *Id.*

What the State is asking this Court to do is to reclassify a discharge from community service at the end of the term into an unsatisfactory discharge. The court of appeals was correct to reject this position.

PRAYER

Ms. Brent respectfully prays that this Court affirm the decision of the First Court of Appeals.

Respectfully submitted,

ALEXANDER BUNIN
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CERTIFICATE OF SERVICE

I certify that on May 20, 2021 I provided this brief to the Harris County District Attorney via the EFILETEXAS.gov e-filing system. This service is required by Texas Rule of Appellate Procedure 9.5.

Additionally, I certify that on May 20, 2021, I provided this brief to the State Prosecuting Attorney via the EFILETEXAS.gov e-filing system. This service is required by Texas Rules of Appellate Procedure 68.11 and 70.3.

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief contains 5,392 words. This word-count is calculated by the Microsoft Word program used to prepare this brief. The word-count does not include those portions of the brief exempted from the word-count requirement under Texas Rule of Appellate Procedure 9.4(i)(1). The number of words permitted for this type of computer-generated brief (a brief in response in an appellate court) is 15,000. Tex. R. App. P. 9.4(i)(2)(B).

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